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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050920
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: Registration No. 3,009,990
Trademark: ENTELLECT
Registered November 1, 2005

INTELLECT TECHNICAL SOLUTIONS, INC.

Petitioner,

v.

MILENA SONI,

Respondent.

Cancellation No.: 92050920

PETITIONER'S TRIAL REPLY BRIEF

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II. INTRODUCTION

Intellect Technical Solutions, Inc. files this reply to Respondent's trial brief filed July 15, 2011 (the "Resp. Brief") pursuant to TTAB Rule 801.02(c) and the Board's order of September 1, 2011 in this proceeding. In Respondent's Trial Brief, Respondent objects to Petitioner's evidence and makes arguments that (i) Petitioner has not shown it was using INTELLECT prior to Respondent's claimed date of first use and (ii) Respondent has provided ample evidence of use to maintain her registration. Petitioner addresses each argument individually below.

A. Petitioner's Evidence Clearly Demonstrates Priority

Respondent argues that Petitioner has offered no credible evidence of use of INTELLECT as a service mark earlier than May 1, 2002. This is not true. For example, and without limitation, Petitioner's Exhibit 53 is a website operated by Petitioner prior to 2002 and hosted at www.IntellectStaffing.com. *See* Barge Depo. at 37-46. Each page includes "Intellect Staffing" across the banner, and the words "Contract and Direct-Hire IT Staffing" directly below the banner. Pet. Exh. 53. The individual pages further describe the INTELLECT brand staffing services offered by Petitioner at that time. *Id.* The "About" page recites that "Intellect Technical Solutions, Inc. is a full service provider of contract and permanent staffing." *Id.* Those services are further described on the page entitled "IT Staffing Solutions that fit your needs," which describes the types of staffing services offered, including "Consulting," "Contract-to-perm," "Direct-Hire," and "Outsourced Project Work" and explains that "Intellect is involved in the search and placement of" various types of technical job positions." The page titled "Candidates – Why Choose Intellect" goes on to state that "Whether you are a career consultant or a job seeker looking for full-time employment, Intellect is the right company to partner with in your employment search," and that "Our staff consists of dedicated, experienced, and highly

professional **recruiters** ... [that] take the time to get to know you and your career objectives.”

Id. (emphasis added). This website thus demonstrates both service mark and trade name use of INTELLECT in connection with services sufficiently similar to the “Employment counseling and recruiting” services recited in the subject registration that the Examining Attorney rejected Petitioner’s own application for registration of INTELLECT in connection with those services. Pet. Exh. 141, Office Action dated 11/17/2008.

The fact that the website was operating prior to Respondent’s claimed date of first use is evidenced by the testimony of Mr. Barge, the author of the website, as well as a dated receipt for the registration of the IntellectStaffing.com domain name. *See* Barge Depo. at 38, 45-48, Exh. 82. That evidence is further corroborated by the testimony of Ms. Dabney, Intellect’s records custodian, who testified that prior websites and receipts were maintained in the ordinary course of business by Intellect, that the file dates in Intellect’s electronic archives verified that the website was created in 2001, and that she had personally retrieved a copy of the same website from an online Internet archive, further corroborating the site had been active in 2001. *See* Dabney Depo. at 23-29.

As a second example, Petitioner’s Exhibits 58-68 are copies of sales presentations given by Intellect prior to Respondent’s claimed date of first use. Barge Depo. at 61-84. Taking Petitioner’s Exhibit 58 as an example, each slide includes the Intellect logo in the upper left corner, with “Intellect” in large letters, and “Technical Solutions, Inc.” in smaller letters below. The contents of the slides go on to explain the services being offered. The slide entitled “Overview” states that Petitioner “is a full service provider of contract and direct-hire staffing.” The slides entitled “Our Screening Process” and “Our Submittal Package” discuss the vetting and testing services through which candidates are pre-qualified for placement. *Id.* The slide

entitled “48 Hour Turnaround” states “We will find you a qualified candidate within 48 hours of your request.” *Id.* That these presentations were in use prior to 2002 is corroborated by the testimony of Mr. Barge who had personal recollection of Intellect’s presentations to various business prospects, and Ms. Dabney, who retrieved the presentations from Intellect’s business records and verified the file dates for each presentation. Dabney Depo. at 29-41.

Respondent also appears to argue that Petitioner has not provided evidence that it was actually offering recruiting and consulting services prior to May of 2002. Resp. Brief. at 17. In addition to the testimony of Mr. Barge, Petitioner has also offered copies of actual invoices and agreements from its business records for services provided by Petitioner prior to 2002, including invoices for recruiting employees for positions in various states including Florida, Illinois, Texas, and in Respondent’s home state of California. Pet. Exhs., 116, 118-124. Therefore, contrary to Respondent’s argument, Petitioner has provided clear evidence that it offered and actually delivered recruiting services under its mark and trade name prior to 2002. Petitioner has also offered certified copies of its incorporation documents, further corroborating its business activities and clearly showing trade name use of Intellect Technical Services, Inc. from well before the claimed first use date through the present. Pet. Exhs. 1-12. In light of the testimony and corroborating documents offered, it is difficult to understand how Respondent could argue, in good faith, that Petitioner has not provided clear evidence that it actually performed recruiting services in interstate commerce prior to 2002.

B. Respondent Has Failed to Demonstrate Sufficient Use to Maintain Her Registration.

Respondent argues that she has offered evidence of her actual use in commerce of the term ENTELLECT sufficient to maintain the subject registration. Resp. Brief at 9-10. However, the evidence Respondent relies on is primarily her own testimony and that of her

husband. In stark contrast to Petitioner's evidence, that testimony is not corroborated by any of the business records one would expect an operating business to maintain in connection with bona fide business operations.

The Board has held that an applicant's assertions of its actions and intentions are not sufficient to show actual bona fide intent to use a mark absent documentary evidence. *See SmithKline Beecham Corp. v Omnisource DDS LLC*, 97 USPQ.2d 1300,1304-05 (TTAB 2010) (finding that where "objective" evidence of intent is required, the absence of documentary evidence is sufficient to prove a lack of bona fide intent). Petitioner argues that this situation, although it admittedly does not involve an ITU application, is nonetheless analogous and that the blank letterhead and business cards, together with the uncorroborated assertions of Respondent and her husband, are not sufficient objective evidence of actual, bona fide use in commerce. Petitioner therefore further argues that an absence of supporting documents such as invoices, receipts and the like, combined with Respondents own testimony describing only sporadic use at base, is sufficient to prove abandonment and/or non-use.¹ Petitioner further notes that, when asked how she used the business cards she relies on to support use, she states that she does not usually give her business card to people when discussing the services she claims to offer, thereby raising further doubt as the extent of use actually made by Respondent. M. Soni Depo at 36.

Respondent also attempts to rely on two additional documents: a "Mission Statement" and a "Purpose Statement." *See* Resp. Brief at 12. During her deposition, however, when asked "Does the word 'Entellect' appear on any documents other than the business cards and letterhead," Respondent answered with a categorical "No." M. Soni Depo at 37. Furthermore,

¹ Respondent has admitted that she has no such documentation. *See* Pet. Exh. 145 at Reqs. 1 and 24, Pet. Exh. 144 at Rog. 1, and Pet. Exh. 143, Req. 7.

while in his deposition, Respondent's husband discusses these documents, he does so only in ambiguous terms that presuppose a legal conclusion. *See* S. Soni Depo. at 15-16. Given that Respondent, in her own deposition, states that she has never placed advertising, used a brochure, placed radio, television or Internet ads, or spent any money on advertising and promotion, it is unclear how the documents were used, to whom they may have been given, and, if so, when and under what circumstances. *See* M. Soni Depo at 36-37. Accordingly, if the documents were legitimately used in commerce, based on Respondent's own testimony, that use was without her knowledge or control. *Id.*

When a prima facie case of abandonment or non-use is established, the burden shifts to the respondent to rebut that showing with evidence of bona fide use in commerce. *Quality Candy Shoppes/Buddy Squirrel of Wisconsin, Inc. v. Grande Foods*, 90 USPQ.2d 1389, 1393 (TTAB 2007). To meet that burden, evidence of mere token use is not sufficient. *See Paramount Pictures v. White*, 31 USPQ.2d 1768, 1774 (TTAB 1994); *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ.2d 1179, 1185 (TTAB 2008).² In this case, Respondent's own testimony establishes a prima facie case of non-use and/or abandonment as she almost exclusively references only token, sporadic referral of friends and family to a test developed by a third party, and Respondent has since failed to come forth with any additional competent evidence to rebut that prima facie showing.

In addition, the cases relied upon by Respondent fail to support her arguments. Respondent cites to *Allard Enterprises, Inc. v. Advanced Programming Resources, Inc.*, 146 F.3d 350 (6th Cir. 1998) to support the proposition that word of mouth marketing can sustain

² Petitioner respectfully disagrees with Respondent's assertion that the *General Motors* case is irrelevant because it deals with a trademark and not a service mark, as the concept of token use applies to both trademarks and service marks.

trademark rights. Resp. Brief. at 12. However, in *Allard*, the defendant showed use of the subject mark on “at least one fax, on at least one resume, and in numerous other solicitations, as they offered New APR’s services to several employers doing business in Ohio.” 146 F.3d at 359. There was also “evidence in this case that several large companies that did business in Ohio identified the APR mark with [the defendant] and his permanent employee placement services.” *Id.* In the present case there are no documents of record, showing the ENTELLECT mark, that could be characterized as resumes or solicitations to numerous companies; nor is there any evidence of record to suggest that any companies identified the ENTELLECT mark with services provided by Respondent. Instead, the present case is more similar to the cases cited by the *Allard* court in which “sporadic or minimal uses of a mark may indicate the mere intent to reserve a mark for later use rather than the present commercial utilization of the mark.” *Id.*

Respondent’s reliance on *Societe de Developments, et al. v. International Yogurt Co., et al.*, 662 F.Supp 39 (D. Or. 1987) is similarly misplaced. In that case, the court noted that “[t]o prove bona fide usage, the trademark holder must demonstrate that the use of the mark has been ‘deliberate and continuous, not sporadic, casual, or transitory.’” 662. F.Supp at 849. The court went on to note that where only token use is made initially, the registrant must “show activities which would tend to indicate a continuing effort or intent to continue such use and place the product on the market on a commercial scale within a time demonstrated to be reasonable in the particular trade.” *Id.* In the present case, there has been no such showing. Respondent testified to only sporadic or casual use, almost entirely to friends, family and casual acquaintances. In other words, beyond some uncorroborated statements regarding the number of people to whom tests were given, there is no reliable evidence of an effort to “place the product on the market on a commercial scale within a time demonstrated to be reasonable in the particular trade.” *Id.*

Respondent also relies on a New York trial court decision that is nearly a century old to support the proposition that a single instance of use is sufficient to support a registration. Resp. Brief at 11 (citing *Ritz Cycle Car Co. v. Driggs-Seabury Ordnance Corp.*, 237 F. 125 (S.D.N.Y. 1916)). This case is inapposite because, as was recognized by the *Allard* court, “effective November 16, 1989, Congress changed the statutory definition of ‘use’ so as to require a greater degree of Activity.” 146 F.3d at 357. Therefore, a case stating that a single use could be sufficient nearly a hundred years ago, is of no relevance today since Congress has long since changed the use requirements.

In sum, Petitioner has established a prima facie case of abandonment and/or non-use based on Respondent’s own testimony and her admissions that there are no business records to substantiate her alleged use of the subject mark. The burden then shifted to Respondent to rebut that prima facie case. *Quality Candy Shoppes*, USPQ.2d 1389, 1393 (TTAB 2007). The Respondent’s efforts, however, fall far short, as they are based on uncorroborated and sometimes contradictory testimony³ and a complete lack of documentary evidence showing any actual sales. Accordingly, Petitioner respectfully argues that abandonment/non-use has been established.

III. RESPONDENT’S EVIDENTIARY OBJECTIONS

Respondent objects to much of the evidence offered by Petitioner, asserting relevance under F.R.E. 402, that the probative value of the evidence is outweighed by other concerns under

³ Compare S. Soni Depo at 15-16 (stating the purpose and mission statements were used to promote the services), M. Soni Depo at 37 (stating there has been no use of the mark except on business cards and letterhead), and Pet. Exh. 134 at Req. 7, confirming that there has been no use except on the business cards and letterhead)).

F.R.E. 403, and hearsay under F.R.E. 802. Petitioner responds to these objections generally below and then to each individually.⁴

A. The Exhibits Are Relevant Under F.R.E. 402.

At a high level, Respondent's relevance objections fall into two categories: (i) the evidence refers (or may refer) to dates after the Respondent's claimed date of first use, and (ii) the evidence does not recite or refer to the services listed in the subject registration. With respect to the latter, Respondent's arguments are misplaced as many of the exhibits offered by Petitioner do, in fact, list the services offered by Petitioner. For example, and as has already been discussed above, copies of Petitioner's early websites and sales presentations use INTELLECT as a service mark and as a trade name and, contrary to Respondent's assertion, each discusses the type of recruiting and employment counseling services claimed in the subject registration. In addition, in the testimony of Mr. Barge and Ms. Dabney, each testifies regarding the recruiting, employment counseling, and consulting activities in which Petitioner has engaged since 1997 and the marketing and promotional activities in which Petitioner has since used the INTELLECT mark. Evidence, such as invoices for employees placed by Petitioner with various customers, invoices for business cards and job search database memberships, customer lists, agreements with employers and job seekers, sales presentations and reference materials distributed to prospects, serve to corroborate that testimony, whether or not each document expressly lists all the types of services offered by Petitioner.

Still further, to the extent any particular exhibit may not expressly use the term INTELLECT in connection with a specific recitation of services offered, under 15 U.S.C. §

⁴ As no objections were made to other exhibits or on grounds other than hearsay, relevance, and other concerns outweighing the probative value, Petitioner restricts its response to only to those issues and only the exhibits to which objections were directed.

1052(d), a mark may not be registered on the principal register if it “so resembles...a mark **or trade name** previously used in the United States by another” that it would create a likelihood of confusion. *Emphasis added.* Accordingly, documents evidencing trade name use of “Intellect Technical Services” or “Intellect Technical Services, Inc.” prior to May of 2002 are directly relevant to the likelihood of confusion element regardless of whether or not they expressly recite specific services, or do so in language different than that selected by Respondent.

With respect to exhibits pertaining to activities occurring after Respondent’s claimed date of first use, those too are relevant as they demonstrate that Petitioner has used the mark trade name continuously from 1997 to the present.

B. Respondent Has Not Properly Stated Objections Under F.R.E. 403

Federal Rule of Evidence 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Respondent cites F.R.E. 403 in every objection made. However, Respondent never once states the concern that outweighs the probative value of the evidence. Petitioner is left at a loss as to whether Respondent is claiming that the relevant exhibit would somehow unfairly prejudice the Respondent (and if so how), would risk confusion of the issues, or would present some other danger cognizable under the Rule. Petitioner argues that Respondent is obligated to state each objection with specificity, thereby allowing Petitioner to respond substantively. Because Respondent has objected only in a cursory, pro-forma manner, all objections made under F.R.E. 403 should be overruled. To avoid making this same argument repeatedly, Petitioner does not separately respond to objections under F.R.E. 403 in its specific responses below, and instead

argues that each such objection was not stated with sufficient particularity to allow Petitioner to respond and should be overruled on that basis.

C. Business Records & Documents Offered for Other Purposes Aren't Hearsay.

Federal Rule of Evidence 801(c) states "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Therefore, to the extent any document is offered for purposes other than to demonstrate the truth of the matters asserted in the document is not hearsay. To the extent a document is hearsay, F.R.E. 803(6) provides an exception for records kept in the ordinary course of business. Therefore, each of the documents to which Respondent objects is either not hearsay because it is not offered to prove the truth of its contents, or was authenticated as a business record by Mr. Barge or by Intellect's records custodian, Ms. Dabney.⁵

D. Individual Responses to Respondent's Objections

In addition to the foregoing, Petitioner responds to the individual objections as follows:

1. OBJECTION: Trial Testimony of James Barge (F.R.E. 402, 403)

RESPONSE: With respect to F.R.E. 402, Respondent fails to state specifically what testimony she objects to, thereby making it impossible for Petitioner to respond specifically. Generally, however, Mr. Barge's deposition and the pages cited in Petitioner's brief, describe the services provided by Petitioner, the channels of trade through which those services are offered,

⁵ To the extent any defect is found with the specific foundation laid to establish each document as a business record, such objections could have been quickly and easily addressed during the depositions of Ms. Dabney and Mr. Barge. As Respondent elected not to attend those depositions (*see* Dabney Depo. at 41,45 and Barge Depo. at 7-8, 166) and did not raise any such objection promptly upon receiving the transcripts, instead waiting until the filing of the Trial Brief, to the extent any objection rests on defects that could have been corrected during the deposition in subsequent deposition during the testimony period, such objection was waived. *See Pass & Seymour, Inc. v. Syrelec*, 224 USPQ 845 (TTAB 1984) (finding objections not made promptly enough to allow the party to remedy the alleged defect in foundation were waived).

Petitioner's sales and marketing efforts, and its use of its marks and trade names, each relevant to the question of likelihood of confusion. To the extent the testimony refers to activities occurring before Respondent's alleged date of first, such testimony relates to the question of priority. To the extent it refers to activities after the date of first use, it tends to establish Petitioner's use has been substantial and continuous from 1997 to the present and goes to the issue of what is reasonable in terms of commercial efforts in the particular trade of offering the recruiting services recited in the subject registration. To the extent it refers to activities Respondent believes are distinguishable, the testimony is still relevant as the Examining Attorney found such activities to be closely enough related to the activities recited in Respondent's registration to reject Petitioner's application. Pet. Exh. 141, Office Action dated 11/17/2008. Mr. Barge's testimony is also relevant as foundation for the various exhibits entered through his testimony.

2. **OBJECTION:** Trial Testimony of Rhonda Dabney (F.R.E. 402, 403)

RESPONSE: With respect to F.R.E. 402, Respondent again fails to state specifically which pages and testimony she objects to as irrelevant, making it impossible for Petitioner to respond specifically to the objection. Generally, the testimony of Ms. Dabney is relevant as it 1) corroborates the testimony of Mr. Barge with respect to Intellect's sales and marketing operations and the fact that those activities relate to services the Examining Attorney deemed similar enough to those listed in the subject registration to draw a rejection of Petitioner's application, 2) demonstrates Intellect's continuous and substantial use of its marks and trade names, and 3) relates to what is reasonable in terms of commercial efforts in the particular trade. Ms. Dabney is also records custodian for Petitioner (*see* Dabney Depo. at 7) making her testimony relevant to lay the foundation for the business records entered through her deposition.

3. **OBJECTION:** Exhibits 1-12 (F.R.E. 402, 403)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it corroborates the testimony of the other witnesses regarding Intellect’s founding and continuous and substantial activities through the present. The documents also tend to show continuous trade name usage from 1998 through the present, which is relevant to the question of priority.

4. **OBJECTION:** Exhibits 13-14, 16-20 (F.R.E. 402, 403)

RESPONSE: With respect to F.R.E. 402, and contrary to Respondent’s objections, the documents 1) recite “Permanent and Contract IT Staffing” services (which, as explained in Mr. Barge’s testimony are equivalent to the “recruiting” services listed in the subject registration), and 2) direct recipients to the IntellectStaffing.com website shown in Pet. Exh. 53, thereby further evidencing its early use. Pet. Exhs. 14, 16-18. The receipts included therein support the testimony that the business cards, letterhead and website were purchased and used prior to 2002 and were not created for the purposes of this proceeding. *Id.* Petitioner’s Exhibit 19 also lists services offered and shows the timeframe on which Petitioner transitioned from IntellectStaffing.com to IntellectCorp.com as a domain name. The remaining exhibits corroborate testimony of Petitioner’s witnesses regarding its founding and early operations.

5. **OBJECTION:** Exhibits 26, 27, 29, 32, 37-42, 47 and 49 (F.R.E. 402, 403, 802):

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show trade name and trademark usage and shows substantial and continuous business operations and use of those trade names or trademarks from prior to Respondent’s claimed date of first use through the filing of this proceeding, and further corroborates testimony of Petitioner’s witnesses. Under F.R.E. 803(6) and 803(7), the documents are an exception to the hearsay rule as business records (with foundation as such properly laid by Ms. Dabney respectively). See Dabney Depo. 10-20.

6. **OBJECTION:** Exhibit 53 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, relevance of Petitioner's website offering its services prior to the claimed date of first use has been discussed at length above. The services recited therein are the same services deemed too similar to those recited in the subject registration to allow for Petitioner's own registration. Pet. Exh. 141 at Office Action dated 11/17/2008. Under F.R.E. 803(6) the document is an exception to the hearsay rule as a business record (with appropriate foundation laid by Ms. Dabney and Mr. Barge) as their testimony establishes that it is Petitioner's ordinary practice to retain copies of prior-used websites in its records. Barge Depo. 38-46 and Dabney Depo. 25-26, 42. To the extent it may be determined not to be a business record, Petitioner then offers it to show the existence and contents of the website hosted at www.intellectstaffing.com prior to Respondent's date of first use and not to establish the truth of any statement made thereon, as such statements are adequately evidenced by the testimony of Mr. Barge and other exhibits. Used for such purpose, the Exhibit is not hearsay.

7. **OBJECTION:** Exhibit 54 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show trade name and trademark usage and shows substantial and continuous use of the relevant trade names and/or trademarks and corroborates testimony of Petitioner's witnesses relating to the nature of Petitioner's services. Under F.R.E. 803(6) the document is an exception to the hearsay rule as a business record (with appropriate foundation laid by Ms. Dabney and Mr. Barge) as their testimony establishes that it is Petitioner's ordinary practice to retain copies of prior-used websites in its records. Barge Depo. 48-50, 45 and Dabney Depo 25, 42. To the extent it may be determined it is not a business record, Petitioner offers it to show the existence and contents of a website hosted at www.intellectcorp.com at dates between Petitioner's founding and the

inception of this proceeding, and not to establish the truth of any statement made thereon. Used for such purpose, the Exhibit is not hearsay.

8. **OBJECTION:** Exhibit 55 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show trade name and trademark usage and shows substantial and continuous use of relevant trade names and/or trademarks and corroborates testimony of Petitioner's witnesses relating to the nature of Petitioner's services. Under F.R.E. 803(6) the document is an exception to the hearsay rule as a business record (with appropriate foundation laid by Ms. Dabney and Mr. Barge) as their testimony establishes that it is Petitioner's ordinary practice to retain copies of prior-used websites in its records. Barge Depo. 45, 50-52 and Dabney 25, 42. To the extent it may be determined it is not a business record, Petitioner then offers it to show the existence and contents of a website hosted at www.intellectcorp.com at dates between Petitioner's founding and the inception of this proceeding, and not to establish the truth of any statement made thereon. Used for such purpose, the Exhibit is not hearsay.

9. **OBJECTION:** Exhibit 57 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to corroborate the testimony of Mr. Barge regarding Petitioner's sales and marketing efforts (Pet. Exhs. 58-68) and that such presentations were in use from at least 2001 through 2008. Under F.R.E. 803(6) the document is an exception to the hearsay rule as a business record (with appropriate foundation laid by Ms. Dabney and Mr. Barge) as their testimony establishes that it is Petitioner's ordinary practice to retain copies of prior-used presentations in its electronic records at this location, and displays the Date Modified metadata contained in those business records but not otherwise displayed on the documents as printed. Barge Depo. 61-84 and Dabney 29-40; 42.

10. **OBJECTION:** Exhibits 58-68 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, relevance of Petitioner's sales presentations offering its services prior to the claimed date of first use has been discussed at length above. The services recited therein are the same services deemed too similar to those recited in the subject registration to allow for Petitioner's own registration. Pet. Exh. 141 at Office Action dated 11/17/2008. The fact that a print date (explained in connection with each exhibit by Ms. Dabney, the person who printed these documents (Dabney Depo. 29-41) does not make them irrelevant as their creation and presentation dates are separately established by Mr. Barge (Barge Depo. 61-84) and by the metadata within the presentations, which is shown on Exhibit 57. Under F.R.E. 803(6) the documents are an exception to the hearsay rule as business records (with appropriate foundation laid by Ms. Dabney and Mr. Barge) as their testimony establishes that it is Petitioner's ordinary practice to retain copies of prior-used sales presentations in its records. Dabney Depo. 29-41, 42 and Barge Depo. 61-84. To the extent it may be determined it is not a business record, Petitioner offers it to show the existence and contents of sales presentations made by Petitioner prior to Respondent's date of first use and not to establish the truth of any statement made thereon, as such statements are adequately evidenced by the testimony of Mr. Barge and other exhibits. Used for such purpose, the Exhibits are not hearsay.

11. **OBJECTION:** Exhibits 69-73 (F.R.E. 402, 403)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show trade name and trademark usage and that use or relevant trademarks and trade names by Petitioner has been continuous. The evidence further corroborates testimony of Petitioner's witnesses with respect to Petitioner's continuous sales and marketing efforts from its founding through the filing of this proceeding and goes to the issue of what is reasonable in terms of commercial efforts in

the particular trade. With respect to the objection that specific services are not listed, each exhibit shows the Intellect logo and refers to the potential benefits of engaging Petitioner for recruiting services and the hazards of engaging its competitors, thereby corroborating the testimony that Petitioner has been continuously offering recruiting services since 1997.

12. **OBJECTIONS:** Exhibit 78 and 79 (F.R.E. 402, 403, 802 – addressed together due to the similarity of the documents, objections and responses)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show continuous usage by Petitioner of relevant trade names. The evidence presented further corroborates testimony of Petitioner’s witnesses with respect to Petitioner’s continuous operations from its founding through the filing of this proceeding, and to the issue of what is reasonable in terms of commercial efforts in the particular trade. With respect to the objection that specific services are not listed, the “About Intellect” section in each exhibit discusses Petitioner’s staffing services, which were deemed similar enough to Respondent’s claimed recruiting services to prevent Petitioner from obtaining registration of its mark in connection with such services Pet. Exh. 141, Office Action dated 11/17/2008. The same sections also corroborate Petitioner’s founding in 1997, well prior to Respondent’s claimed date of first use. Under F.R.E. 803(6) the documents are an exception to the hearsay rule as business records (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner’s ordinary practice to retain copies of press releases in its records. Barge Depo. 89. To the extent it may be determined that either or both is not a business record, Petitioner then offers it to show the existence and contents of a press release issued by Petitioner using its relevant trade name at dates between Petitioner’s founding and the inception of this proceeding, and not to establish the truth of any statement made thereon. Used for such purpose, the Exhibits are not hearsay.

13. **OBJECTION:** Exhibit 81 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show continuous usage by Petitioner of relevant trade names and to describe the services offered by Petitioner. The date of the exhibit is established by the testimony of Mr. Barge (Barge Depo. 156-157). The evidence presented further corroborates testimony with respect to Petitioner's continuous operations from its founding through the filing of this proceeding, and goes to the issue of what is reasonable in terms of commercial efforts in the particular trade. Under F.R.E. 803(6) the document is an exception to the hearsay rule as a business record (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner's ordinary practice to retain copies of prior-used web pages in its records. Barge Depo. 156-157. To the extent it may be determined it is not a business record, Petitioner then offers it to show the existence and contents of a web page relating to Petitioner's recruiting and staffing services and not to establish the truth of any statement made therein. Used for such purpose, the Exhibit is not hearsay.

14. **OBJECTION:** Exhibit 82 (F.R.E. 402, 403)

RESPONSE: Under F.R.E. 402, relevance of Petitioner's website offering its services prior to the claimed date of first use (Exhibit 53) has been discussed at length above. Exhibit 82 is a business record demonstrating the purchase (prior to Respondent's claimed date of first use) of the domain name at which that website was hosted. The domain name itself also represents trademark use of the term INTELLECT as it is followed by a description of the services being offered ("staffing") and points consumers to a location at which additional information regarding Petitioner's staffing and recruiting services may be received.

15. **OBJECTION:** Exhibit 94 (F.R.E. 402, 403)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show trade name and/or trademark usage and shows continuous use of the trade names or trademarks. The evidence presented further corroborates testimony of Petitioner's witnesses as to its business activities. With respect to services, it recites "staff augmentation services" which are essentially the same as staffing and recruiting services. The exhibit also references the URL that Petitioner transitioned to from www.intellectstaffing.com, thereby corroborating Mr. Barge's testimony with respect to Petitioner's use of its websites in its marketing and advertising efforts. (Barge Depo. 90-91). The relevant date of the exhibit is established by testimony and, to the extent such date is after Respondent's date of first use, the evidence is relevant to establish continuous use by Petitioner.

16. **OBJECTION:** Exhibit 102 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it relates to business consultation, business management and consultation, business management consultation, and personnel management consultation services (all of which are recited in the subject registration) offered by Petitioner, specifically consultation on the topics of hiring and detecting resume fraud. The date of the exhibit is established by testimony (Barge Depo. 91-93) and tends to show Petitioner's continuous offering of such services during dates relevant to this proceeding and to corroborate Petitioner's testimony regarding the nature of the services it offered under relevant marks and trade names. Under F.R.E. 803(6) the document is an exception to the hearsay rule as a business record (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner's ordinary practice to retain copies of such tip sheets in its records. *Id.* To the extent it may be determined not to be a business record, Petitioner then offers it to show the existence and contents of a marketing piece issued by Petitioner between Petitioner's founding

and the inception of this proceeding, and not to establish the truth of any statement made thereon. Used for such purpose, it is not hearsay.

17. **OBJECTION:** Exhibit 103, 104-111 (F.R.E. 402, 403, 802) (addressed together due to the similarities of the exhibits, objections and responses)

RESPONSE: Under F.R.E. 402, the documents (each dated prior to Respondent's claimed date of first use) are relevant to corroborate Mr. Barge's testimony regarding Petitioners substantial activities in providing recruiting, staffing and related services prior to Respondent's claimed use of the term ENTELLECT. They are also relevant to show what is reasonable in terms of commercial efforts in the particular trade. In this case, it is an example of the types of trade organizations one offering recruiting services is likely to join and the types of job site services they are likely to utilize in the performance of those services, and of which Respondent makes no use. Under F.R.E. 803(6), the documents are an exception to the hearsay rule as business records (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner's ordinary practice to retain such forms and receipts in its records. Barge Depo. 94-108.

18. **OBJECTION:** Exhibits 112-115 (F.R.E. 402, 403)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show actual and repeated performance of recruiting services (which are specifically referenced in each document) for specific customers by Petitioner, all prior to Respondent's claimed date of first use. Under F.R.E. 803(6), the documents are an exception to the hearsay rule as business records (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner's ordinary practice to retain copies of such letters in its records. Barge Depo. 108-114. To the extent the documents may be determined not to be business records, Petitioner argues that they

should be considered under the residual hearsay exception of F.R.E. 807, as the nature of the documents have equivalent circumstantial guarantees of trustworthiness in that they are dated, signed and occur on the letterhead of third parties, they are evidence of a material fact (actual performance of claimed services to particular customers prior to the claimed first use date), are particularly probative as to the specific customers for which those services were rendered during that time frame, and the interest of justice will be best served by entry of the exhibits.

19. **OBJECTION:** Exhibit 116 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show actual performance of placement services (which are expressly referenced therein) by Petitioner prior to Respondent's claimed date of first use and corroborates Mr. Barge's testimony regarding Intellect's business activities between 1997 and 2001. Under F.R.E. 803(6), the document is an exception to the hearsay rule as business records (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner's ordinary practice to retain copies of such agreements in its records. Barge Depo. 114-118.

20. **OBJECTION:** Exhibit 117 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show actual performance of recruiting services by Petitioner in various geographic regions prior to Respondent's claimed date of first use and corroborates Mr. Barge's testimony regarding Intellect's business activities between 1997 and 2001. The document also identifies "Permanent and Contract IT Staffing" services and the www.intellectstaffing.com URL at which the site shown in Exhibit 53 was hosted. Under F.R.E. 803(6), the document is an exception to the hearsay rule as business records (with appropriate foundation laid by Mr. Barge) as his testimony

establishes that it is Petitioner's ordinary practice to retain such letters in its records. Barge Depo. 118-119.

21. **OBJECTION:** Exhibit 118 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because it tends to show actual performance of placement services by Petitioner prior to Respondent's claimed date of first use, the contracts used by Intellect in performing such services in 1999, and corroborates Mr. Barge's testimony regarding Intellect's business activities between 1997 and 2001. Under F.R.E. 803(6) the document is an exception to the hearsay rule as business records (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner's ordinary practice to retain copies of such agreements in its records. Barge Depo. 120-123.

22. **OBJECTION:** Exhibits 119-124 (F.R.E. 402, 403, 802)

RESPONSE: Under F.R.E. 402, the evidence is relevant because the invoices tends to show actual performance of placement services by Petitioner in 1998, 1999, and 2000 (all prior to Respondent's claimed date of first use) in various locations including Florida, Illinois, and Respondent's home state of California, the only U.S. state in which Petitioner understands she claims to have provided services. The invoices further corroborate Mr. Barge's testimony regarding Intellect's business activities between 1997 and 2001. Under F.R.E. 803(6), the documents are an exception to the hearsay rule as business records (with appropriate foundation laid by Mr. Barge) as his testimony establishes that it is Petitioner's ordinary practice to retain copies of such agreements in its records. Barge Depo. 123-125.

To the extent any objections made by Respondent have not be specifically addressed herein, Petitioner relies on the general responses set forth above.

IV. CONCLUSION.

Contrary to Respondent's arguments, Petitioner has provided testimony supported by substantial documentary evidence demonstrating that Petitioner has been using INTELLECT as a service mark and "Intellect Technical Solutions, Inc." as a trade name, since at least 1997 and, in any event, prior to Respondent's claimed date of first use. As such, Petitioner has established priority in connection with recruiting, staffing, employment testing, and consulting services. Through Respondent's own testimony, discovery responses and admissions, Petitioner has also established a prima facie case of non-use based on mere casual, token use and Respondent's complete lack of the kinds of documentation typically kept in connection with bona fide offering of services in commerce. Respondent has failed to rebut that prima facie case, in particular failing to offer even a single document evidencing an actual sale or marketing expense. Finally, Petitioner has addressed each evidentiary objection raised in Respondent's Trial Brief and, for each, has explained that the evidence is relevant and is either not hearsay, or is covered under a recognized hearsay exception. Accordingly, Petitioner respectfully requests that its Petition to Cancel be granted.

Respectfully submitted,

Date: September 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petitioner's Trial Reply Brief to counsel at the following addresses:

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Dated: September 21, 2011

_____/William G. Giltinan/
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